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FEDERAL COMMUNICATIONS COMMISSION
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March 18, 1996

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William F. Caton, Acting Secretary
Federal Communications Commission
Washington, DC 20554

Re: Revision of Part 22 and
Part 90 of the Commission's
Rules to Facilitate Future
Development of Paging Systems
WT Docket No. 96-18
PP Docket No. 93-253

Dear Mr. Caton:

Transmitted herewith on behalf of TSR Paging Inc. are one (1) original paper, nine (9) paper copies, one (1) silver master microfiche, and two (2) diazo duplicate microfiche copies of Comments with respect to the Notice Of Proposed Rulemaking released by the Commission on February 9, 1996, in the above-captioned proceeding.

Should you have any questions with respect to this matter, please communicate directly with this office.

Sincerely,

Richard S. Becker

Richard S. Becker
Attorney for TSR Paging Inc.

Enclosures

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Revision of Part 22 and) WT Docket No. 96-18
Part 90 of the Commission's)
Rules to Facilitate Future)
Development of Paging Systems)
)
Implementation of Section) PP Docket No. 93-253
309(j) of the Communications)
Act -- Competitive Bidding)

To: The Commission

COMMENTS

Respectfully submitted,

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SUMMARY

By these Comments, TSR Paging Inc. ("TPI") comments on the Notice Of Proposed Rulemaking ("NPRM") in the above-captioned rulemaking proceeding. Specifically, TPI respectfully submits that the Commission must revise its proposal regarding exemption of Private Carrier Paging ("PCP") nationwide exclusive channels from geographic licensing to make clear that any PCP channel that is already licensed to an entity on a nationwide exclusive basis must be exempted from geographic licensing subject only to termination of the nationwide exclusivity (and subsequent geographic licensing of remaining "white areas") in the event that the licensee does not comply with Commission-imposed construction requirements. Although the NPRM is not clear, it appears that the Commission may be impermissibly attempting to take away nationwide exclusivity already granted to certain licensees like TPI in direct violation of the Commission's own rules and decisions, the previously-articulated Commission purpose for those rules, the Communications Act of 1934, as amended (the "Act"), fundamental principles of due process and the overriding public interest in rapid licensing and deployment of nationwide paging systems.

TPI currently provides wide-area, common carrier paging ("CCP") and PCP service in numerous states. TPI is also licensed for a "Phase II" nationwide exclusive paging system on the PCP Channel 929.2125 MHz ("TPI Nationwide System") and TPI is currently in the process of completing construction of that system pursuant to an extended implementation authorization ("Slow Growth Authorization") granted to TPI by the Commission on December 1, 1995, pursuant to 47 C.F.R. §90.496. As a multi-state, wide-area CCP and PCP paging carrier, TPI is extremely interested in the proposals set forth in the NPRM. Most importantly, however, TPI is concerned that the Commission may impermissibly subject TPI's nationwide exclusive PCP frequency 929.2125 MHz to geographic licensing.

TPI supports certain aspects of the Commission's proposal regarding nationwide exclusive PCP channels. Specifically, TPI supports: (1) the Commission's general proposal to exempt nationwide PCP channels from geographic licensing; (2) the Commission's proposal to issue a single nationwide license for use of a nationwide PCP channel in place of site-specific authorizations; and (3) the Commission's statement that failure to comply with applicable construction requirements will result in loss of nationwide exclusivity, treatment of constructed stations as incumbent stations and authorization of remaining "white areas" to other entities pursuant to geographic licensing and auctions. TPI has taken unprecedented steps to complete construction of the TPI Nationwide System in compliance with Section 90.495(a)(3) nationwide exclusivity requirements and in accordance with TPI's Slow Growth Authorization and TPI once again assures the Commission

that TPI will timely meet and exceed those construction requirements. As a result, TPI concurs in the Commission's stated intent to strictly enforce PCP nationwide exclusive construction requirements.

TPI does, however, strongly oppose the Commission's proposed definition of which nationwide exclusive PCP channels will be exempt from geographic licensing. By attempting to limit this definition to those nationwide exclusive PCP frequencies whose licensees "have met the construction requirements for nationwide exclusivity as of the adoption date of this Notice [February 8, 1996]," the Commission is acting directly contrary to Commission Rules, precedent, underlying regulatory objectives, the Act, fundamental principles of due process and the overriding public interest in rapid licensing and deployment of nationwide paging systems.

The currently proposed definition of nationwide exclusive PCP channels exempt from geographic licensing violates the following Commission regulations: (1) Section 90.495(c) of the Commission's Rules, which grants exclusivity "at the time of initial licensing;" (2) Sections 90.495(b) and 90.495(b)(3), which thereafter prohibit any co-channel licensing throughout the United States unless and until the nationwide exclusive PCP licensee fails to meet applicable construction standards; and (3) Section 90.496(d), which explicitly extends exclusivity for the duration of any extended implementation construction period authorized pursuant to Section 90.496 of the Commission's Rules.

Moreover, the proposed definition will violate the Commission's articulated purpose for establishing nationwide exclusivity on PCP channels to "provide an incentive for future expansion of coverage by nationwide licensees" and "to encourage development of systems that cover a larger area over those that cover a smaller area." The unmistakable effect of the Commission's proposed definition of nationwide exclusive PCP frequencies exempt from geographic paging will be to terminate outstanding TPI's nationwide exclusivity and bring an immediate halt to TPI's extraordinary construction efforts to complete the TPI Nationwide System as quickly as possible.

The Commission's proposed definition of nationwide exclusive PCP channels exempt from geographic licensing is also inconsistent with the underlying reason for excluding nationwide channels from geographic licensing. The Commission stated that, "[b]ecause these channels are not open to further licensing, we believe there is no practical need to assign them on a geographic basis." At present, based on Commission grant of the TPI Nationwide System Authorization, no other applicant can be authorized for the frequency 929.2125 MHz anywhere in the United States. The Personal Communications Industry Association cannot legally coordinate any additional 929.2125 MHz applications and the Commission cannot

legally grant any such additional 929.2125 MHz applications. In view of the fact that the period for TPI to complete construction of the TPI Nationwide System is still outstanding, TPI's frequency 929.2125 MHz is in exactly the same position as other PCP nationwide exclusive channels whose licensees have already completed construction of their nationwide system -- i.e., no other applicant can be authorized for the subject nationwide exclusive frequency. Accordingly, the Commission's proposed definition is directly contrary to the very rationale articulated by the Commission for exempting nationwide exclusive PCP channels from geographic licensing.

Adoption of the incorrect definition will also violate Section 316 of the Act in that it will subject TPI's nationwide exclusive PCP channel 929.2125 MHz to geographic licensing, thereby resulting in a drastic and severely-damaging unilateral modification of the TPI Nationwide System Authorization. This devastating modification of the TPI Nationwide System Authorization would have been illegally undertaken by the Commission in violation of Section 316 of the Act without any demonstration that the modification "will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States..." and without affording TPI the due process hearing rights guaranteed to TPI pursuant to Section 316 of the Act.

In point of fact, the only conceivable justification for Commission adoption of the proposed definition of nationwide exclusive PCP frequencies to exclude TPI's 929.2125 MHz would be an attempt by the Commission to increase revenues by making as many PCP frequencies as possible subject to geographic licensing and competitive bidding. As the Commission is surely aware, this intent would be in direct violation of Section 309(j)(7)(A) of the Act.

In addition to violating Section 316 of the Act, subjecting 929.2125 MHz to geographic licensing in violation of the outstanding TPI Nationwide System Authorization and Slow Growth Authorization also violates TPI's fundamental rights to due process of law and probably constitutes an unlawful taking within the meaning of the just compensation clause of the Fifth Amendment to the Constitution.

Commission adoption of the proposed definition of nationwide exclusive PCP frequencies exempt from geographic licensing must also be rejected because it would impermissibly treat TPI differently than other similarly-situated nationwide exclusive licensees whose frequencies are also exempt from further licensing by operation of the Commission's Rules. There is no rational or justifiable basis for disparate treatment of TPI's nationwide exclusive frequency 929.2125 MHz and other nationwide exclusive PCP frequencies.

For all of these reasons, TPI respectfully submits that the Commission must modify that portion of the NPRM by which the Commission defined those nationwide exclusive PCP frequencies that will be exempt from geographic licensing. Specifically, the Commission must reject its currently proposed definition that is limited to "PCP channels for which licensees have met the construction requirements for nationwide exclusivity as of the adoption date of [the NPRM]." In its place, the Commission must adopt the following definition:

All PCP channels for which nationwide exclusivity has been authorized pursuant to Sections 90.495(a)(3) and 90.495(c) of the Commission's Rules and who either: (i) have met the construction requirements for nationwide exclusivity as of the adoption date of the NPRM; or (ii) have time remaining as of the adoption date of the NPRM to meet these construction requirements.

The Commission must also implement this revised definition by including TPI's nationwide exclusive PCP frequency 929.2125 MHz in the Public Notice of nationwide exclusive PCP frequencies that will be exempt from geographic licensing as envisioned in paragraph 26 of the NPRM. TPI must remind the Commission that correcting the definition of nationwide exclusive PCP channels exempt from geographic licensing as specified herein will still allow the Commission to ensure compliance with construction requirements and auction any original PCP nationwide exclusive channels whose licensees lose their exclusivity for failure to meet construction requirements.

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To: The Commission

COMMENTS

TSR Paging Inc. ("TPI"), by its attorneys and pursuant to 47 C.F.R. §1.415, hereby submits these Comments in response to the Commission's Notice Of Proposed Rulemaking¹ in the above-captioned rulemaking proceeding.² In support of these Comments, the following is respectfully shown.

I. Introduction

1. In the NPRM, the Commission proposed extensive revisions to its regulation of common carrier paging ("CCP") services pursuant to Part 22 of the Commission's Rules³ and private paging

¹Notice Of Proposed Rulemaking, WT Docket No. 96-18, PP Docket No. 93-253, FCC 96-52 (February 9, 1996) (hereinafter "NPRM").

²On March 1, 1996, TPI filed Comments ("Interim Comments") with respect to the Interim Licensing Proposal adopted by the Commission as part of the NPRM. NPRM at ¶¶139-149. On March 11, 1996, TPI filed Reply Comments with respect to the Interim Licensing Proposal. The instant Comments by TPI address the remainder of the NPRM.

³The Commission pointed out that Part 22 CCP channels include 35, 43, 152, 158, 152/158, 454/459 and 931 MHz channels used for paging service. NPRM at ¶3. These channels will be referred to collectively hereinafter as "CCP Channels."

("PCP") services pursuant to Part 90 of the Commission's Rules.⁴ Specifically, the Commission proposed to move from the current site-specific regulatory approach to a geographic licensing approach where the Commission will issue single licenses for geographic areas that encompass many sites.⁵ The Commission also proposed to adopt competitive bidding rules for mutually-exclusive ("MX") applications for geographic paging licenses.⁶

2. By these Comments, TPI addresses a single, critically important aspect of the far-reaching proposals adopted in the NPRM. Specifically, TPI respectfully submits that the Commission must revise its proposal regarding exemption of PCP nationwide exclusive channels from geographic licensing to make clear that any PCP channel that is already licensed to an entity on a nationwide exclusive basis must be exempted from geographic licensing subject only to termination of the nationwide exclusivity (and subsequent geographic licensing of remaining "white areas") in the event that the licensee does not comply with Commission-imposed construction requirements. As demonstrated below, although the NPRM is not clear, it appears that the Commission may be impermissibly attempting to take away nationwide exclusivity already granted to certain licensees like TPI in direct violation of the Commission's

⁴The Commission pointed out that Part 90 PCP channels include 152/158, 462, 465 and 929 MHz channels used for paging service. NPRM at ¶3. These channels will be referred to collectively hereinafter as "PCP Channels."

⁵NPRM at ¶1.

⁶Id.

own rules and decisions, the previously-articulated Commission purpose for those rules, the Communications Act of 1934, as amended (the "Act"), fundamental principles of due process and the overriding public interest in rapid licensing and deployment of nationwide paging systems.

II. The Interest Of TPI

3. TPI is a communications company primarily engaged in the provision of one-way paging services. TPI currently provides wide-area, one-way paging service in numerous states, including New York, Connecticut, Rhode Island, Massachusetts, Maine, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, the District of Columbia, Texas, Wisconsin, Illinois, Indiana, New Mexico, Arizona, Nevada and California. TPI provides one-way paging service on both CCP Channels and 929 MHz PCP Channels. In point of fact, TPI is now licensed for a nationwide exclusive paging system on the PCP Channel 929.2125 MHz⁷ and TPI is currently in the process of completing construction of that system pursuant to an extended implementation authorization granted to TPI by the Commission on December 1, 1995, pursuant to 47 C.F.R. §90.496.⁸ As a multi-state, wide-area CCP and PCP paging carrier, TPI is extremely

⁷See, e.g., Station WPGD 501, File No. 674235. This system will be referred to hereinafter as the "TPI Nationwide System." The Commission authorizations for the TPI Nationwide System will be referred to collectively hereinafter as the "TPI Nationwide System Authorization." TPI's application package for the TPI Nationwide System will be referred to hereinafter as the "TPI Nationwide System Application."

⁸See Commission Letter 7110-162 dated December 1, 1995 (hereinafter "Slow Growth Authorization").

interested in the proposals set forth in the NPRM. Most importantly, however, TPI is concerned that the Commission may impermissibly subject TPI's nationwide exclusive PCP frequency 929.2125 MHz to geographic licensing.

**III. TPI Supports Certain Aspects Of The Commission's
Proposal Regarding Nationwide Exclusive PCP Channels**

4. In the NPRM, the Commission stated that:

While we generally proposed to use geographic licensing for 931 and 929 MHz channels, we proposed to exclude from our plan those channels that already have been assigned to single licensees on a nationwide basis under our existing rules.

NPRM at ¶26.

As the nationwide exclusive licensee of PCP frequency 929.2125 MHz, TPI whole-heartedly concurs with this Commission conclusion. Having been licensed for 929.2125 MHz on a nationwide exclusive basis, and having expended extraordinary amounts of time and money to complete construction of the TPI Nationwide System as quickly as possible within applicable Commission construction deadlines, TPI agrees that exemption from geographic licensing for nationwide exclusive paging frequencies is critical to the continuing development and expansion of optimally-efficient nationwide paging systems.

5. The Commission went on to state that:

We seek comment on whether a licensee who has obtained nationwide exclusivity on a paging channel should be given a single nationwide license for use of the channel instead of continuing to operate under site-specific authorizations. We tentatively conclude that such licenses should be issued for 929 MHz licensees who meet our coverage requirements.

NPRM at ¶26.

Once again, as the licensee of nationwide exclusive PCP frequency 929.2125 MHz, TPI supports the Commission's tentative conclusion to grant a single licensee to nationwide licensees like TPI. This proposal will greatly assist TPI in its aggressive efforts to expand the TPI Nationwide System by eliminating the need for constant filing of numerous site-specific license applications on 929.2125 MHz. TPI respectfully submits that the time and expense that TPI currently expends to comply with the onerous site-specific licensing requirements would be better spent on expansion and continuing upgrade of the TPI Nationwide System.

6. In the NPRM, the Commission also made clear that:

We emphasize, however, that licensees who have qualified for nationwide exclusivity on a channel must meet the construction and service requirements set forth under our current rules in order to retain their nationwide assignments. If the licensee fails to comply with such requirements, we tentatively conclude that the channel should be made available for geographic licensing, and such licensee would receive protection as an incumbent only for those areas where it has completed construction and commenced service.

NPRM at ¶26 (footnote omitted).

As set forth above, TPI is currently in the process of completing construction of the TPI Nationwide System to comply with Section 90.495(a)(3) nationwide exclusivity requirements within the time frame authorized by the Commission in the December 1, 1995, Slow Growth Authorization. TPI has always been aware of the existing stricture in Section 90.496(e) of the Commission's Rules that:

"[Slow growth] authorizations under this section are conditioned upon the licensee's compliance with the submitted extended implementation schedule. Failure to meet this schedule will result in loss of authorizations for facilities not constructed and loss of exclusivity as

provided in §90.495(c).

47 C.F.R. §90.496(e).⁹

The cited provision in the NPRM is entirely consistent with the requirements of Sections 90.495(c) and 90.496(e) of the Commission's Rules and TPI recognizes that if it fails to timely complete construction of the TPI Nationwide System to comply with Section 90.495(a)(3) nationwide exclusivity requirements, TPI will lose the valuable nationwide exclusivity that the Commission granted "at the time of initial licensing" pursuant to Section 90.495(c) of the Commission's Rules.

7. In point of fact, TPI has taken unprecedented steps to complete construction of the TPI Nationwide System in compliance with Section 90.495(a)(3) nationwide exclusivity requirements in accordance with TPI's Slow Growth Authorization. TPI has already constructed and placed into operation hundreds of 929.2125 MHz transmitter locations and TPI has expended millions of dollars in its construction efforts. TPI once again reiterates to the Commission that TPI will complete construction of the TPI

⁹This restriction also applies to PCP exclusivity even where extended implementation authorization is not granted. Specifically, Section 90.495(c) of the Commission's Rules provides, in relevant part, that:

A proposed paging system that meets the criteria for channel exclusivity under paragraph (a) of this section will be granted exclusivity under this section at the time of initial licensing. Such exclusivity will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date.

47 C.F.R. §90.495(c).

Nationwide System in complete accordance with the Slow Growth Authorization. TPI fully intends to go far beyond the minimum Section 90.495(a)(3) nationwide exclusivity requirements to construct the TPI Nationwide System to provide unequalled, comprehensive, nationwide paging service that will compete directly with other existing PCP and CCP nationwide paging systems. In light of these achievements and goals, it is clear that TPI has no intention whatsoever of losing the extremely valuable nationwide exclusivity already granted by the Commission pursuant to Sections 90.495(c) and 90.495(b) of the Commission's Rules. Moreover, TPI fully supports the proposal in the Commission's NPRM to make clear that failure to timely comply with applicable construction deadlines will result in: (i) loss of nationwide exclusivity; (ii) geographic licensing of the subject PCP frequency; and (iii) relegation of the licensee's existing facilities to incumbent status with no rights to expand without opposition on a nationwide basis.

IV. TPI Strongly Opposes The Commission's Proposed Definition Of Which Nationwide Exclusive PCP Channels Will Be Exempt From Geographic Licensing

8. TPI must, however, emphasize that the Commission's proposed definition of which PCP nationwide exclusive channels will be exempt from geographic licensing is overly restrictive and directly contrary to Commission Rules, precedent, underlying regulatory objectives, the Act, fundamental principles of due process and the overriding public interest in rapid licensing and deployment of nationwide paging systems. Specifically, in the

NPRM, the Commission stated that:

We proposed to exclude [from geographic licensing] ... all PCP channels for which licensees have met the construction requirements for nationwide exclusivity as of the adoption date of this Notice [February 8, 1996]. We will announce, by Public Notice, the specific PCP channels excluded for nationwide use at a later time. Because these channels are not open to further licensing, we believe that there is no practical need to assign them on a geographic basis. In addition, we believe that the development of nationwide systems that has been fostered by nationwide assignment of certain channels will benefit the public and should be allowed to continue without disruption.

NPRM at ¶26 (emphasis added).

9. As specified herein, TPI is currently completing construction of the TPI Nationwide System within the time frame authorized by the Commission in TPI's Slow Growth Authorization and pursuant to the nationwide exclusivity granted to TPI on 929.2125 MHz "at the time of initial licensing" pursuant to Section 90.495(c) of the Commission's Rules. Despite TPI's ongoing construction efforts and its commitment to timely completing construction of the TPI Nationwide System, it is possible that because TPI did not complete construction of the TPI Nationwide System by the February 8, 1996, adoption date of the NPRM, the Commission might subject 929.2125 MHz to geographic licensing, thereby unlawfully modifying the TPI Nationwide System Authorization to eliminate TPI's existing nationwide exclusivity without cause, notice or opportunity for a hearing. TPI respectfully submits that the Commission must clarify its definition of nationwide exclusive PCP channels exempt from geographic licensing to include those channels, like 929.2125 MHz,

licensed to entities on a nationwide exclusive basis even if the licensees are "Phase II" exclusive licensees who are continuing to construct their systems within authorized Commission construction schedules.

**V. The Commission's Definition Violates
Explicit Commission Regulations**

10. Section 90.495(c) of the Commission's Rules unequivocally provides that:

A proposed paging system that meets the criteria for channel exclusivity under paragraph (a) of this section will be granted exclusivity under this section at the time of initial licensing. Such exclusivity will expire unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within eight months of the licensing date.

47 C.F.R. §90.495(c) (emphasis added).

Accordingly, it is clear that upon grant of the TPI Nationwide System Authorization, TPI was granted nationwide exclusivity on PCP frequency 929.2125 MHz. The TPI Nationwide System Application had been properly coordinated by the Personal Industry Communications Association ("PCIA") and PCIA had certified the TPI Nationwide System as qualifying for nationwide exclusivity pursuant to 47 C.F.R. §90.495(a)(3).¹⁰ By granting the TPI Nationwide System Application, the Commission granted TPI nationwide exclusivity on the PCP frequency 929.2125 MHz. This grant of exclusivity occurred by operation of Section 90.495(c) of the Commission's Rules.

11. Moreover, Section 90.495(b) of the Commission's Rules explicitly states that:

¹⁰See PCIA No. 940000360.

If a paging licensee qualifies for exclusivity under paragraph (a) of this section, no co-channel authorization may be granted to another applicant except in compliance with the separation requirements set forth in this paragraph.

47 C.F.R. §90.495(b).

With respect to nationwide exclusive channels, Section 90.495(b)(3) goes on to state that:

No co-channel authorization will be granted in the continental United States, Alaska, Hawaii, or Puerto Rico on any frequency assigned to a nationwide paging system as defined in paragraph (a)(3) of this section.

47 C.F.R. §90.495(b).

These unambiguous regulations, by their plain meaning, confirm that "at the time of initial licensing" of the TPI Nationwide System, TPI obtained nationwide exclusivity on 929.2125 MHz and that this frequency became protected from co-channel licensing anywhere in the United States.¹¹ In point of fact, once TPI qualified for nationwide exclusivity on 929.2125 MHz as confirmed by PCIA's coordination of the TPI Nationwide System Application, no further 929.2125 MHz authorizations could be coordinated by PCIA or authorized by the Commission.

12. The only limitation on the nationwide exclusivity rights granted "at the time of initial licensing" pursuant to 47 C.F.R. §§90.495(b) and 90.495(c) is that the exclusivity will expire "unless the proposed system (or a sufficient portion of the system to qualify for exclusivity) is constructed and operating within

¹¹47 C.F.R. §§90.495(b) and (c).

eight months of the licensing date."¹² Section 90.496 goes on to provide that certain PCP exclusive licensees may request extended implementation authorization to allow for construction of the authorized exclusive PCP system for a period of up to three (3) years.¹³ In either case, however, failure to comply with the applicable construction requirement results in "loss of authorizations for facilities not constructed and loss of exclusivity as provided in §90.495(c)."¹⁴

13. It must also be emphasized that Section 90.496(d) of the Commission's Rules clearly states that:

If an extended construction schedule is authorized under this section, channel exclusivity under §90.495 will be extended for the duration of the construction period.

47 C.F.R. §90.496(d)

Accordingly, once an extended implementation authorization (like the Slow Growth Authorization issued to TPI on December 1, 1995) is granted by the Commission, the exclusivity granted "at the time of initial licensing" pursuant to 47 C.F.R. §90.495(c) is extended "for the duration of the construction period."¹⁵

14. Accordingly, pursuant to the explicit provisions of Sections 90.495(b), 90.495(c) and 90.496 of the Commission's Rules, TPI was granted nationwide exclusivity on PCP frequency 929.2125

¹²47 C.F.R. §90.495(c).

¹³47 C.F.R. §90.496.

¹⁴47 C.F.R. §90.496(e); see also 47 C.F.R. §§90.495(c)(1) and (2).

¹⁵47 C.F.R. §90.496(d).

MHz "at the time of initial licensing." This exclusivity authorization included not only the right to construct and operate the transmitters identified in the TPI Nationwide Application, but also the right for a specified period of time to install 929.2125 MHz transmitters throughout the United States without any co-channel authorizations being granted to any other applicant.¹⁶ Based on the Commission's December 1, 1995, grant of TPI's Slow Growth Authorization, TPI's nationwide exclusivity was extended "for the duration of the construction period" and TPI still has a significant amount of time left to complete construction of the TPI Nationwide System as specified in TPI's Slow Growth Authorization.

15. In the NPRM, however, it appears that the Commission is violating these explicit regulatory provisions by attempting to prematurely terminate TPI's nationwide exclusivity rights by subjecting the frequency 929.2125 MHz to geographic licensing during TPI's ongoing extended implementation period authorized pursuant to 47 C.F.R. §90.496. As identified above, by defining nationwide PCP channels exempt from geographic licensing as only those nationwide exclusive PCP channels "for which licensees have met the construction requirements for nationwide exclusivity as of the adoption date of [the NPRM],"¹⁷ the Commission appears to be excluding TPI's frequency 929.2125 MHz, thereby subjecting this frequency to geographic licensing, i.e., licensing by other entities throughout the United States, in direct violation of TPI's

¹⁶47 C.F.R. §§90.495(b), (b)(3).

¹⁷NPRM at ¶26.

nationwide exclusivity rights. As demonstrated above, this definition of nationwide exclusive PCP frequencies adopted by the Commission in the NPRM is in direct violation of Sections 90.495 and 90.496 of the Commission's Rules and must be changed.

**VI. The Commission's Definition Violates
The Purpose Underlying Commission Regulations**

16. In establishing nationwide exclusivity and bestowing on nationwide exclusive licensees the right to construct nationwide systems without any co-channel applicants during a specified period of time, the Commission very clearly articulated its intent to foster the development of nationwide systems. Specifically, in its decision adopting PCP exclusivity requirements, the Commission stated that:

The purpose of nationwide exclusivity is not only to prevent interference with existing operations, but to provide an incentive for future expansion of coverage by nationwide licensees.

Report and Order, PR Docket No. 93-35, 8 FCC Rcd 8318, 8323 (1993) (hereinafter "R&O"), recon., Memorandum Opinion and Order, FCC 96-53 (February 13, 1996).

This regulatory intent was reflected in the Commission's stated justification for requiring that all Phase II PCP applicants comply with either local, regional or nationwide exclusivity requirements and establishing a dispositive eligibility preference in MX situations in favor of existing licensees expanding PCP systems over new licensees seeking to establish initial PCP systems. Specifically, the Commission stated that:

First, the restriction will tend to encourage development of systems that cover a larger area over those that cover a smaller area. Because increased coverage allows customers greater mobility without loss of access to

service, we believe that wider-area systems are generally more beneficial to paging customers and more responsive to the rising demand for paging services. Second, allowing existing licensees to expand their service area will result in broader coverage for existing users of those systems, whereas authorizing a new competing system would prevent such users from obtaining expanded coverage without subscribing to both services. Third, by encouraging expansion of existing systems, the restriction will promote rapid access to wide-area service for new users as such systems reach new areas, whereas applicants who have yet to construct any portion of their systems would generally require more time to make wide-area service available.

R&O at 8330.

17. The unmistakable effect of the Commission's proposed definition of nationwide exclusive PCP frequencies exempt from geographic paging will be to terminate outstanding TPI's nationwide exclusivity and bring an immediate halt to TPI's extraordinary construction efforts to complete the TPI Nationwide System as quickly as possible. Instead of affording TPI the already-authorized ability to install the widest-possible area paging system (i.e., a nationwide paging system), application of geographic licensing to 929.2125 MHz during TPI's outstanding construction period would allow other licensees the opportunity to establish new, smaller paging systems, thereby fragmenting operation on 929.2125 MHz and precluding the establishment of the very nationwide paging systems that the Commission's PCP exclusivity requirements were specifically intended to foster. In short, adoption of the Commission's proposed definition of nationwide exclusive PCP channels exempt from geographic paging would directly contravene not only the explicit provisions of Sections 90.495(b), 90.495(c) and 90.496 of the Commission's Rules,

but would also violate the express purpose underlying Commission adoption of those regulations.

**VII. The Commission's Definition Is Inconsistent
With The Underlying Reason For Excluding
Nationwide Channels From Geographic Licensing**

18. In the NPRM, the Commission articulated the underlying rationale for exemption of both CCP and PCP nationwide channels from geographic licensing:

Because these channels are not open to further licensing, we believe there is no practical need to assign them on a geographic basis.

NPRM at ¶26.

Similarly, in exempting applications on nationwide CCP and PCP channels from the freeze on paging application filing included as part of the Commission's Interim Licensing Proposal in the NPRM, the Commission pointed out that:

In the case of CCP and PCP licensees who have obtained nationwide exclusivity on a paging channel, we will allow applications for additional sites without restrictions. Because we do not propose to apply geographic licensing to such channels, and no other applicant may apply for them, the addition of such sites by the nationwide licensee will not affect the spectrum available to others and is consistent with the goals of this rulemaking.

NPRM at ¶142 (emphasis added).

These provisions demonstrate that the Commission is proposing to exempt nationwide CCP and PCP channels from geographic licensing because no applicant other than the nationwide exclusive licensee can apply for these channels.

19. The Commission's proposed definition of nationwide exclusive PCP channels exempt from geographic licensing flies in the face of this underlying Commission rationale. Specifically, it

is irrefutable that at present, based on Commission grant of the TPI Nationwide System Authorization, no other applicant can be authorized for the frequency 929.2125 MHz anywhere in the United States.¹⁸ PCIA cannot legally coordinate any additional 929.2125 MHz applications and the Commission cannot legally grant any such additional 929.2125 MHz applications.¹⁹ In view of the fact that the period for TPI to complete construction of the TPI Nationwide System is still outstanding, TPI's frequency 929.2125 MHz is in exactly the same position as other PCP nationwide exclusive channels whose licensees have already completed construction of their nationwide system -- i.e., no other applicant can be authorized for the subject nationwide exclusive frequency.

20. Accordingly, TPI respectfully submits that the Commission's attempt to limit the definition of nationwide exclusive PCP frequencies exempt from geographic licensing as only those channels, whose "licensees have met the construction requirements for nationwide exclusivity as of the adoption date of [the NPRM],"²⁰ is directly inconsistent with the very reason articulated by the Commission for exempting nationwide exclusive channels from geographic licensing.

¹⁸47 C.F.R. §§90.495(b), (b)(3); see also 47 C.F.R. §§90.495(c), 90.496(d).

¹⁹Id.

²⁰NPRM at ¶26.

**VIII. The Correct Definition Of Nationwide Exclusive
PCP Channels Exempt From Geographic Licensing**

21. In this regard, TPI must note that the Commission can correct its error in the NPRM's definition of PCP nationwide exclusive frequencies exempt from geographic licensing by:

1. Changing the definition to:

All PCP channels for which nationwide exclusivity has been authorized pursuant to Sections 90.495(a)(3) and 90.495(c) of the Commission's Rules and who either: (i) have met the construction requirements for nationwide exclusivity as of the adoption date of the NPRM; or (ii) have time remaining as of the adoption date of the NPRM to meet these construction requirements.

2. Including in the Public Notice envisioned by the Commission at paragraph 26 of the NPRM TPI's nationwide exclusive frequency 929.2125 MHz.

In this way, the Commission's definition of nationwide exclusive PCP channels as adopted in the NPRM for geographic licensing purposes will be consistent with the Commission's explicit regulations regarding PCP exclusivity.

22. TPI must also emphasize that correcting the definition of nationwide exclusive PCP channels exempt from geographic licensing as specified herein will still allow the Commission to ensure compliance with construction requirements and auction any original PCP nationwide exclusive channels whose licensees lose their exclusivity for failure to meet construction requirements. The Commission itself recognized this authority in the NPRM when it stated that:

If a licensee fails to comply with [construction and service] standards, we tentatively conclude that the channel should be made available for geographic licensing, and such licensee would receive protection as

an incumbent only for those areas where it has completed construction and commenced service.

NPRM at ¶26 (footnote omitted).

Accordingly, bringing the Commission's definition of nationwide exclusive PCP channels exempt from geographic licensing into accord with Sections 90.495 and 90.496 of the Commission's Rules as requested by TPI herein will not in any way limit the Commission's ability to enforce construction and service requirements. The Commission itself has explicitly recognized this enforcement mechanism and TPI supports this mechanism as specified above.²¹

**IX. Adoption Of The Incorrect Definition
Will Violate Section 316 Of The Act**

23. It is well-established that a Commission authorization "requiring - as it does - substantial investment is more than a mere privilege or gratuity. [It] is a thing of value to the person to whom it is issued and a business conducted under it may be the subject of injury."²² Consistent with this maxim, Section 316 of the Act explicitly provides licensees with the right to a hearing before their licenses may be modified unilaterally by the Commission.²³

²¹See paragraphs 6-7, supra.

²²See L.B. Wilson, Inc. v. FCC, 170 F.2d 793, 798 (D.C.Cir. 1948).

²³Section 316 provides, in relevant part, that:

(a) Any station license ... may be modified by the Commission ... if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this Act or of any treaty ratified by the United States.... No such order of modification shall become final until the holder of the license or permit shall have been notified in writing of the proposed action and the grounds and reasons therefor,